Civil No. 22385

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAN FRANCISCO - OAKLAND NEWSPAPER GUILD, an unincorporated association,

Appellant,

vs.

THE TRIBUNE PUBLISHING CO., a corporation,

Appellee,

APPELLEE'S REPLY BRIEF

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United States Court of Appeals

For the Ninth Circuit

San Francisco - Oakland Newspaper Guild, an unincorporated association, *Appellant*,	
vs.	
The Tribune Publishing Co., a corporation, *Appellee*,	

APPELLEE'S REPLY BRIEF

JURISDICTIONAL STATEMENT

This is an action brought by a labor union to vacate a portion of an arbitrator's award on the grounds that the arbitrator exceeded his authority. The jurisdiction of the District Court is based on §301 of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. §185, and the jurisdiction of this Court arises under 28 U.S.C. §1291, which gives this Court jurisdiction of all appeals from a final decree of District Courts of the United States.

STATEMENT OF THE CASE

1. Appellant labor union, hereinafter called the "Guild," and Appellee newspaper, hereinafter called the "Tribune," are parties to a labor contract dated April 6, 1966. (R. 5)

2. During the term of said contract, disagreement arose between the parties as to the correct interpretation of certain of the wage provisions of Article XX thereof. (R. 5, P. 35)

3. The Guild moved this disagreement to final and binding arbitration under the provisions of Article VI (R. 5, P. 6) of the labor contract and the matter was heard on February 6, 1967, before Hubert Wyckoff, Esq., one of the panel of arbitrators provided for therein.

4. At the hearing the Guild framed its position in the form of four separate grievances on behalf of individually named employees (Bill Doyle, Tom Flynn, Bill Britton and Harvey Schwartz) and others similarly situated. (R. 28)

5. Arbitrator Wyckoff issued his award on April 6, 1967, (R. 8-17) and the effect thereof was to deny the Doyle and Flynn grievances, but to sustain the Guild on the Britton and Schwartz grievances. Pursuant to the latter, the Tribune increased the weekly salaries for and paid out substantial amounts of back pay to Britton and Schwartz and some thir-

teen additional employees similarly situated. (R. 28, 29)

6. The present action is a proceeding by the Guild to overturn that portion of the Wyckoff award which denies the Doyle and Flynn grievances. No challenge is raised as to the arbitrator's authority in respect of his award upholding the Britton and Schwartz grievances. The proceeding was begun in the District Court for the Northern District of California and therein the Honorable Stanley A. Weigel denied the Guild's and granted the Tribune's motion for summary judgment on September 20, 1967. (R. 53) Thereafter, on October 16, 1967, the Guild appealed to this Court. (R. 72)

7. The issue raised by the Doyle and Flynn grievances is limited to employees classified under *Schedule "A,"* specifically, those provided for under the heading *"Schedule 'A' Top Minimum (more than 6 years' experience)"*—as shown at Article XX of the labor contract. (R. 5, P. 32, 33) This issue can be expressed variously in terms of its effect on employee wage rates, but the parties' basic disagreement was whether wage increases required under the *Schedule "A" Top Minimum* percentage schedule (R. 5, P. 33) could be offset against wage increases required under *Schedule "D."* (R. 5, P. 35, 36) The Tribune position was "for" the offset, the Guild's "against;" this was the question which the parties

submitted to arbitrator Wyckoff's jurisdiction and which he determined in the exercise thereof.

ARGUMENT

I.

AUTHORITY OF THE COURTS IN LABOR ARBITRATION SUITS.

The authority of this court to compel arbitration and to confirm arbitration awards, and its limited authority to vacate such awards, is derived from Section 301(a) of the Labor-Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C.A. Sec. 185 (a), and the interpretation thereof by the United States Supreme Court which in 1956 enunciated the rule that specific enforcement would be applicable to labor arbitration agreements and labor arbitration awards pursuant to Section 301(a). *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 1 Law Ed. 2d 972, 77 Supreme Court 912. The Supreme Court went on to hold that the policy to be applied in enforcing arbitration agreements was reflected in the national labor laws. Generally, the federal labor policy is "to promote industrial stabilization through the collective bargaining agreements." Arbitration is considered a major factor in achieving industrial peace. *Textile Workers* v. *Lincoln Mills, supra,* 353 U.S. 448, 454, 455.

Subsequent to the *Lincoln Mills* decision the state courts, as well as the federal courts, temporarily

embarked on a course which tended to reduce the efficacy of labor arbitration agreements and awards thereunder. Misunderstanding the true meaning of *Lincoln Mills*, these courts assumed broad powers of review over all labor arbitration awards. Symbolic of this trend was *Machinists* v. *Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 NYS 2d 317, aff'd 297 N.Y. 519, 74 NE 2d 464. The *Cutler-Hammer* case held that "if the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." *Machinists* v. *Cutler-Hammer, Inc., supra,* 271 App. Div. 918. In 1960 the Supreme Court in three sweeping decisions overruled the *Cutler-Hammer* doctrine, explained the *Lincoln Mills* decision, and extended the scope of arbitration in the labor relations field to unprecedented limits. These three landmark decisions are today commonly referred to as the *Steelworkers* trilogy. These cases are discussed immediately below.

1. *United Steelworkers* v. *American Mfg. Co.*

In *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 4 L. Ed. 2d 1403, 80 Sup. Ct. 1343, the Supreme Court overruled decisions of the District Court and the Court of Appeals for the Sixth Circuit in which those courts had held that a "frivolous, patently baseless grievance" was not subject to arbitration. The grievant in that case had sought

reinstatement subsequent to industrial injury and subsequent to a workmen's compensation permanent disability settlement of 25%. The employer urged that the grievant was estopped from arbitrating his reinstatement claim and that the grievance was patently frivolous because of the 25% permanent disability. The Supreme Court reversed the lower court's holding that it was no business of the courts to weigh the merits of the grievance.

In holding that the reinstatement grievance was a matter to be determined by the arbitrator, the Court *specifically* overruled the *Cutler-Hammer* doctrine, *supra*. The Supreme Court held that the policy of the Labor-Management Relations Act could only be effectuated "if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *American Mfg. Co., supra,* 363 U. S. 566, and further stated:

> "Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator"—"The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *American Mfg. Co., supra,* at 568.

Then the Court went on to say in reference to the *Cutler-Hammer* case:

> "The lower courts in the instant case had a like preoccupation with ordinary contract law. The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious." *American Mfg. Co., supra,* at 567.

2. *United Steelworkers of America* v. *Warrior and Gulf Nav. Co.*

In the *Warrior and Gulf case,* 363 U.S. 574, 4 L. Ed. 2d 1409, 80 Supreme Court, 1347, the Supreme Court again overruled lower federal courts. The grievants there were members of a union which sought to arbitrate the question of "contracting-out" work which had previously been done by members of the Union. The Company resisted arbitration and urged that its management rights clause precluded the union from arbitrating matters which were "strictly the function of management.'

In discussing the arbitrability of the contracting-out grievance the Court compared labor arbitration to arbitration in ordinary civil cases:

> "In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitra-

tion of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. *For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.*

"The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. See *Schulman, Reason, Contract, and Law and Labor Relations*, 68 Harvard Law Rev. 999, 1004, 1005. The collective agreement covers the whole employment relationship. It calls into being a new common law—a common law of a particular industry or of a particular plant." *Warrior & Gulf Nav. Co.*, *supra*, at p. 579. (Emphasis supplied.)

The Court then discussed the role of an arbitrator and the tools an arbitrator uses in performing his functions within the "industrial self-government."

"Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is ac-

tually a vehicle by which meaning and content are given to the collective bargaining agreement"—"The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *(Warrior & Gulf Co., supra,* at p. 581 and 582.)

The Court finally concluded that it could not be said "with positive assurance" that the question of

"contracting-out" was necssarily excepted from the grievance procedure.

> "The grievance alleged that the contracting-out was a violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the meaning and application of the provisions of this Agreement' which the parties had agreed would be determined by arbitration,
>
> "The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting-out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts." *(Warrior & Gulf Nav. Co., supra,* at p. 585).

3. *United Steelworkers* v. *Enterprise Corp.*

In *United Steelworkers* v. *Enterprise Corporation,* 363 U.S. 593, 4 L. Ed. 2d 1424, 80 Supreme Court 1358, a union won an arbitration award and petitioned the District Court for enforcement. Causing the arbitration was the discharge of a group of employees who had left their jobs in protest against the earlier discharge of a fellow worker. A grievance protesting the discharge of the protesting employees followed. The arbitrator found the discharges to be without cause, and ordered reinstatement of the workers with the loss of ten days pay, to correspond

to a ten days' suspension, which the arbitrator considered the employees deserved.

However, prior to the issuance of the arbitration award, the collective bargaining agreement expired. The arbitrator rejected the contention that the expiration of the agreement barred reinstatement of the employees. The District Court agreed, but the Court of Appeals reversed on three grounds: (1) that the failure of the award to specify the amounts to be deducted from back pay, rendered the award unenforceable (and then went on to state that this error could be remedied by requiring the parties to complete their arbitration); (2) that the back pay award subsequent to the expiration of a collective bargaining agreement rendered the award unenforceable; and (3) requiring reinstatement of discharged employees subsequent to an expired collective bargaining agreement also rendered the arbitration award unenforceable.

The Supreme Court reversed the judgment of the Court of Appeals, but sent the matter back to the arbitrator to determine the exact amounts due under the arbitrator's award.

> "*The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.* The federal policy of settling labor disputes by arbitration would be undermined

if courts had the final say on the merits of the awards. As we stated in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L. Ed. 2d 1409, 9-S. Ct. 1347, decided this day, the *arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process.* They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.

"When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations." (*Enterprise Corp., supra,* 363 U.S. 596, 597.) (Emphasis supplied.)

"As we there emphasized (United Steelworkers v. American Mfg. Co.) the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which is bargained for; and as far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." (*Enterprise Corp., supra,* 363 U.S. 599.)

These three trilogy decisions have been discussed and examined in depth, first to point out their significant impact on traditional contract arbitration law, and secondly, to illustrate the underlying policy of the labor laws moving the Court to act as it did.

All too often a party seeking to avoid the unfavorable results of a labor arbitration award, as is the case with the appellant here, will emphasize familiar language in the *United Steelworkers* v. *Enterprise* case, *supra*, stating that "the award is legitimate only so long as it draws its *essence* from the collective bargaining agreement. When the arbitrator's words *manifest* an *infidelity to this obligation*, courts have no choice but to refuse enforcement of the award." *Enterprise Corp., supra*, 363 U.S. 597 (emphasis supplied). This language, so often quoted for the purpose of attacking the merits of an award, is a misapplication of the true purpose of the trilogy decisions, as is clear upon careful reading. We respectfully suggest that the Arbitrator's "fidelity to his obligation" is always fully met so long as the arbitrator does not act in a clearly arbitrary or capricious manner in rendering an award. We believe this to be the true *essence* of the national labor policy as construed by the courts in considering labor arbitration agreements and awards.

4. *Federal case law since the Steelworkers trilogy.*

Federal case law since the trilogy decisions endorses the use of arbitration in all disputes arising out of the contact between labor and management in their collective bargaining relationship. The courts have conscientiously recognized their extremely limited jurisdiction in this area and have consistently applied the broad principles and puroses of the *Steelworker* trilogy decisions. The cases are too numerous to mention all of them, but pertinent to the instant case are the following decisions:

(a) *UAW* v. *Daniel Radiator Corp. of Texas*, (CA-5; 1964) 328 F. 2d 614. The court held that settlements of grievances are matters exclusively to be determined by the arbitrator.

(b) *AVCO Corp. Electronics and Ordnance Division v. Mitchell* (CA-6; 1964), 336 F. 2d 289. The court held that the question of timeliness of grievances concerns interpretation of the contract and is a matter exclusively for the arbitrator.

(c) *Newark Stereotypers Union No. 18* v. *Newark Morning Ledger Co.*, (D.C. N.J.; 1966) 261 F. Supp. 832. An arbitration award may not be examined for alleged mistakes of law and erroneous evaluation of evidence.

(d) In *American Radiator & Stand. San. Corp.* v. *Local 7 of International Bro. of Operative Potters*, (CA-6; 1966) 358 F. 2d 455, the employer resisted

arbitration on the grounds that one of the Union's grievances claimed there was a new job. The company contended that the creation of new jobs under the management rights provision was strictly a prerogative of the Company. The court ordered arbitration.

> "It is not the province of the courts to determine issues of fact which bear upon the questions of whether a particular section of the contract has been violated. This is the function of the arbitrator. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403. It is therefore our opinion that the question of whether new jobs have been created is an issue of fact which bears upon the issue of whether there has been a contract violation as charged by the union."

Lodge No. 12, etc. v. *Cameron Iron Works, Inc.*, (CA-5; 1961) 292 F. 2d 112. In the *Cameron Iron Works* case the court correctly held that the remedy of back pay in addition to reinstatement as a consequence for an illegal discharge was a matter exclusively for the arbitrator. This decision demonstrates fidelity to the Supreme Court's pronouncements. The Court correctly related the holding to the trilogy cases:

> "From the trilogy opinions several things seem clear. The merits of the controversy may not

> be looked to by a court for the purpose of declaring that a legal interpretation of the contract would not support the conclusion sought. *This may not be done directly, nor may it be done under the quise of determining that the matter is outside the agreement to arbitrate.* The acceptance of (any such) view would require courts, even under the standard arbitration to review the merits of every construction of the contract. *This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would never be final.*" 363 U.S. 593, at pages 598-599, 80 S. Ct. 1358, at page 136; *Cameron Iron Works Inc., supra,* at p. 118. (Emphasis supplied.)

Finally, the Court in *Cameron* emphasized that it had an obligation to defer to the informed judgment of the arbitrator once he had rendered his award.

> "Likewise, whether it is thought to be a part of the substantive right or more a part of the grievance procedure, in the absence of clearly restrictive language, great latitude must be allowed in fashioning the appropriate remedy constituting the arbitrator's 'decision'." *Cameron Iron Works, Inc., supra,* at p. 119.

II.

APPELLANT CONTRADICTS HIS POSITION ON SPECIFICATION OF ERRORS RELIED ON NO. 2 (APP. BRIEF P. 5).

There is no evidence that the award denied general increases to all employees earning over $200.00 and it did not do so. Appellant's original complaint correctly refers to "some," not "all" employees earning over $200.00 (par. VI, R. 2).

The award speaks for itself, but the fact is that it denies such employees an increase only if they had already received (by operation of the *Schedule "A" Top Minimum* percentage schedule) (R. 5, P. 32, 33) increases totaling $16.00 or more, that is, increases which equal or exceed the total of the three general increases of $5.00, $5.00 and $6.00 provided for by *Schedule "D."* (R. 5, P. 35) In other words the arbitrator ruled that if the increase received under *Schedule "A"* (R. 5, P. 33) equaled or exceeded that required by *Schedule "D,"* (R. 5, P. 35) the former could be offset against the latter. This is borne out by Appellant's brief at Page 9 thereof.

Appellant also has no evidence for his statement (Brief, P. 9) that the arbitrator "relied only on the language of the contract itself."

The arbitration award does not state what points the arbitrator relied on in reaching his decision, but as the Transcript of the Hearing shows there was

testimony by the chief negotiators for both parties and numerous documents were submitted in evidence by each side.

III.

THE CASES CITED BY APPELLANT ARE NOT IN POINT.

1. *United Steelworkers of America* v. *Enterprise Wheel and Car Co.* (supra).

2. *Torrington Company* v. *Metal Products Workers* (2nd Cir. 1966, 362 F. 2d 677).

This appeal presented the question as to whether an arbitrator exceeded his authority in ruling that the agreement contained an implied provision, based upon prior practice between the parties. Torrington allowed its employees up to an hour off with pay to vote on election day. This policy had been instituted by the Company and was not part of the collective bargaining agreement. The court at page 680 said:

> "Therefore, we hold that the question of an arbitrator's authority is subject to judicial review, and that the arbitrator's decision that he has authority should not be accepted when the reviewing court can clearly perceive that he has derived that authority from sources outside the collective bargaining agreement at issue."

In this case Torrington had revoked the above policy by newsletter in 1962 and by formal notice

to the union in April, 1963, and the court felt that it was within the employer's discretion to make such a change, since the narrow arbitration clause in the previous collective bargaining agreement precluded resort to arbitration by the union and, therefore, held that the arbitrator had abused his authority when he attempted to read into the agreement this contractual relationship.

3. *H. K. Porter* v. *United Saw, etc. Workers* (3rd Cir. 1964, 333 F. 2d 596).

This case is not in point but reiterates the Court's view in *United Steel Workers* v. *Warrior Gulf Navigation Company*, supra, at p. 600.

> "The labor arbitrator's course of law is not confined to the express provisions of the contract as the industrial common law—the practice of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. . . ."

4. *Truck Drivers & Helpers* v. *Ulry-Talbert Co.* (8th Cir. 1964, 330 F. 2d 562).

In this case the Company discharged a truck driver who altered his time cards. The case was taken to arbitration and the arbitrator found that the truck driver was dishonest but held that the penalty of discharge was too severe and reinstated him. The court held that the arbitrator violated the terms of

the contract, as the contract clearly left the matter of discharge with the Company.

5. *Firestone* v. *United Rubber Workers* (1959, 168 C.A. 2d 444, 448-449, 335 P. 2d 990).

Where an agreement between a union and a company provided that when an employee in Classification A was temporarily assigned to Classification B, he should receive the rate of pay of Classification A or B, whichever was higher, but did not provide that a Board of Arbitration could decide that while the employee was temporarily employed in Classification B, the employee should receive the compensation in Classification C, the Board had no power to decide the rate of pay other than in accord with the powers expressly conferred on it.

CONCLUSION

The arbitrator was authorized by the provisions of the labor contract (Article VI, P. 6-8) to make a final and binding determination on all issues raised by the written grievances.

In the instant case he was asked to determine whether the appellant's or the appellee's interpretation of certain contract provisions was correct. In finding for one of the parties, he expressly discharged the specific duty he had been asked to perform.

Appellant's appeal, viewed realistically, is no more than an attempt to re-arbitrate the merits of the

parties' contract interpretation dispute because of its dissatisfaction with arbitrator Wyckoff's award.

To overturn the present award on such grounds would be contrary to the principles of collective bargaining and the national labor policy favoring arbitration as enunciated in the trilogy cases.

For the above reasons, this Court should affirm the judgment of the District Court.

Dated: May 14, 1968, Oakland, California.

Respectfully submitted,

HAROLD W. JEWETT, JR., ESQ.

Attorney for Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for theNinth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: May 14, 1968, Oakland, California.

HAROLD W. JEWETT, JR.